

No. 78-1044

Supreme Court, U.S.  
FILED  
FEB 17 1979  
RECEIVED, 17, CLEP

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In the Supreme Court of the United States

OCTOBER TERM, 1978

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PASQUALE DI LUIGI, PETITIONER

v.

MAJOR GENERAL NICHOLAS P. KAFKALAS

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*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE THIRD CIRCUIT*

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**MEMORANDUM FOR THE RESPONDENT  
IN OPPOSITION**

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WADE H. MCCREE, JR.  
*Solicitor General*  
*Department of Justice*  
*Washington, D.C. 20530*

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Petitioner contends that the National Guard Technicians Act of 1968 creates a "property" interest that precludes the summary dismissal of a civilian technician employee during the one-year probationary period established by Army regulations.

1. Petitioner enlisted in the Pennsylvania National Guard in November 1974 (Pet. 3). On June 16, 1975, he was hired as a civilian technician, in accordance with the provisions of the National Guard Technicians Act of 1968, 32 U.S.C. 709 (Pet. 3-4). Like other technicians employed under this program, petitioner was hired on a one-year probationary basis. He received written notice that his appointment was on a trial basis (Pet. 3, 4; Pet. App. 12a).

In March 1976, during the ninth month of his probationary employment, petitioner was formally notified that his immediate superior had recommended that his employment be terminated. In his report to the commander of the military facility at which petitioner worked, petitioner's supervisor stated that petitioner's "conduct and general character traits are such that retention in Federal service is not recommended" (Pet. App. 3a).

Following this notification of his recommended dismissal, petitioner met with the Army facility commander at least four times to discuss the matter (Pet. App. 3a). Petitioner's supervisor and his employee representative were present at some of these meetings (*ibid.*). The facility commander approved the dismissal recommendation; respondent, the Pennsylvania Adjutant General, formally notified petitioner that his discharge would be effective April 30, 1976. The Adjutant General's letter stated that petitioner's employment was being terminated because of his "[i]nability to cope with certain responsibilities inherent in [his] position" and his "[i]nability to grasp and maintain basic fundamentals required of [his] position" (*ibid.*).

Petitioner then brought this action in the United States District Court for the Middle District of Pennsylvania. He sought reinstatement, back pay, and punitive damages. See 28 U.S.C. 1346(a)(2) (the Tucker Act); 5 U.S.C. 5596(b) (the Back Pay Act). Petitioner argued that, under the National Guard Technicians Act of 1968, his employment as a civilian technician can be terminated only "for cause". 32 U.S.C. 709(e). Therefore, according to petitioner, the Act creates a "property" right in such employment, even for probationary employees, and employment cannot be terminated without an appropriate notice and opportunity for a hearing.

The district court accepted petitioner's theory and found that he was not afforded adequate notice. The court ordered that petitioner be reinstated with back pay but left respondent free to institute new termination procedures complying with due process (Pet. App. 4a-5a).<sup>1</sup>

Petitioner appealed from the district court's judgment insofar as it allowed respondent to institute a new termination proceeding. Respondent cross-appealed in order to challenge the reinstatement and award of back pay (Pet. App. 5a).

The court of appeals held that the Army regulations establishing a one-year probationary period during which civilian technicians may be dismissed summarily "for less than cause can "be read in harmony with the statute" (Pet. App. 3a).<sup>2</sup> The court ruled that the "for cause" language in 32 U.S.C. 709(e) was not intended to grant civilian technicians in the National Guard "greater advantages \* \* \* than other civil service employees, nor to deny the government the opportunity to further evaluate these new employees during a trial period" (*id.* at 8a). The court concluded that the Army regulations "are in concert with congressional intention to put the technicians in the same position as civil service employees to the extent reasonably possible" (*id.* at 12a).

2. Petitioner argues (Pet. 6-12) that the National Guard Technicians Act "creates a property interest in a civilian technician's employment regardless of his 'conditional' or non-conditional status." Petitioner relies on 32 U.S.C. 709(e)(3), which states:

<sup>1</sup>Petitioner was reinstated in accordance with the district court's order; he has since been discharged following a new termination proceeding (Pet. App. 5a).

<sup>2</sup>These regulations are set forth in Technician Personnel Pamphlet 904, at paras. 3-7, 3-8 (May 25, 1972). See Pet. App. 9a-10a & n.5. The court of appeals' opinion is reported at 584 F. 2d 22.

Notwithstanding any other provision of law and under regulations prescribed by the Secretary concerned—

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(3) a technician may, at any time, be separated from his technician employment for cause by the adjutant general of the jurisdiction concerned.

Petitioner contends that this provision precludes the Secretary of the Army from establishing by regulation a one-year probationary period of employment during which a civilian technician may be dismissed for less than cause (Pet. 6-7).

As the court of appeals correctly concluded, this argument ignores the Act's legislative history, which demonstrates the congressional intent that National Guard civilian technicians be treated like civil service employees in the competitive service. Congress unquestionably expected that technicians employed under the Act would be subject to the same one-year probationary period applicable to competitive civil service employees. Cf. 5 C.F.R. 315.804, 315.806.

The Act made National Guard civilian technicians federal, rather than state, employees. In order to facilitate technicians' placement in the dual role of National Guard unit member and full-time civilian employee, Congress excepted 95% of the program participants from the competitive civil service. 32 U.S.C. 709(d); S. Rep. No. 1446, 90th Cong., 2d Sess. 5 (1968); H.R. Rep. No. 1823, 90th Cong., 2d Sess. 6 (1968); Pet. App. 5a-6a. But this does not mean that Congress intended to accord National Guard technicians tenure rights superior to those enjoyed by competitive civil service employees. On the contrary, Congress envisioned that National Guard technicians, like civil service employees, would be subject to a one-year probationary period.

In discussing the credit to be afforded civilian technicians for past service, both committee reports state:

For 95 percent of the technicians, who will be required to hold military membership in the Guard and who will be in the noncompetitive category, past service is relevant *for the purpose of completing the 1-year probationary period of Federal employment which is generally required prior to entering a career status.*

For 5 percent of the technicians who will be in the competitive category, past service is significant not only *for the 1-year probationary period* but for credit in order to complete the 3-year period of career conditional employment prior to becoming a career employee.

S. Rep. No. 1446, *supra*, at 7; H.R. Rep. No. 1823, *supra*, at 8 (emphasis added).

These comments indicate that Congress contemplated a probationary class of National Guard technicians like the one created by the Army's regulations. Congress expected that class of employees to be subject to the same sort of summary discharge procedures applicable to probationary civil service employees. The challenged regulations are thus fully consistent with legislative intent, and the only reasonable reading of the "for cause" requirement in 32 U.S.C. 709(e)(3) is that it applies to technicians who have been granted a tenured status following the one-year probationary period.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.  
Solicitor General

FEBRUARY 1979

DOJ-1979-02